## MISCELLANY.

RECENT AMENDMENTS OF THE BANKRUPTCY ACT.—Of the recent amendments to the Bankruptcy Act, a very excellent account of which, by Robert H. Talley, Esq., of Richmond, is elsewhere published, the *New York Law Journal* says:

"It is a source of congratulation that the Bankruptcy Act has been amended, and substantially all the changes seem well advised. One of such changes was imperatively demanded, i. e., the clause with regard to preferences, which has been passed to meet the decision of the Supreme Court of the United States in *Pirie* v. *Chicago T. &. T. Co.* (5 Am. B. R. 814). The interference with business would have been very serious if the doctrine had been allowed to stand as laid down in that case, that payment made in good faith after actual insolvency, though in due course of trade without intention of making preference, must be surrendered before the creditor who receives such payment can prove the balance of his debt. We believe that there is quite a general sentiment in favor of the increase of the fees of referees and trustees. It is matter of satisfaction that the Federal courts are given concurrent but not exclusive jurisdiction of suits to recover property which had been fraudulently transferred. There was quite a strong movement at one time to vest such power in the Federal courts exclusively. There would have been no sufficient reason for such a radical change; so far as our observation has gone the State courts have thoroughly co-operated with the bankruptcy courts.

"It would seem that the hostility toward Federal bankruptcy legislation, which cropped out at the time of the passage of the present law, has largely subsided. The recent amendments will serve to make the act more workable and increase public satisfaction with it. Very likely the act will have to be amended in some further features from time to time. In its present shape, however, it is, in our judgment, far superior to the system, or rather lack of system, which prevailed under the operation of State insolvency laws."

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PRIVILEGE OF ACCUSED AGAINST CORPORAL EXAMINATION.—An illustration of the tenderness for the accused shown by the courts of to-day, is furnished in a recent Iowa decision. Testimony of physicians who had made a compulsory physical examination of a prisoner charged with rape was held inadmissible on the ground of privilege. *State* v. *Height*, 91 N. W. 935. The limits of the rule that the accused may not be compelled to give evidence tending to incriminate himself must be determined largely by the reasons on which the rule is based. Two distinct grounds have been suggested, that of mercy toward the prisoner, and that of the unreliability of evidence thus obtained. On the latter ground, it is urged with much force that if the accused himself be compelled to take the witness stand, his testimony will be untrustworthy, being given under bias; and further, that a skillful cross-examination may entrap him into apparent admissions and confessions which may mislead the jury. This reasoning obviously does not apply to cases of search or inspection or exhibition of the person, in

which the reliability of the evidence depends on others than the accused. The other ground, however, that of mercy, while not a weighty consideration in the administration of the law at the period when the privilege originated, is perhaps the strongest element in its support to-day. From this point of view the question is mainly as to the extent to which the guilty should be shielded. The innocent do not need to claim privilege in these cases, and their inconvenience will be slight. See 5 Harv. L. Rev. 71. Since the purpose of the trial is to secure justice, the demands of mercy are surely satisfied by the exemption of the accused from testifying by word of mouth or in writing, and any further concession is unwise.

It is well settled that the privilege will not be granted when the prisoner in court is asked to rise or to uncover his face for purposes of identification. *State* v. *Reasby*, 100 Ia. 231; *State* v. *Prudhomme*, 25 La. Ann. 522. But the weight of authority is probably that he need not submit to a much more extended inspection. *Day* v. *State*, 63 Ga. 667; *People* v. *McCoy*, 45 How. Prac. (N. Y.) 216; *contra*, *Walker* v. *State*, 7 Tex. App. 245; *State* v. *Ah Chuey*, 14 Nev. 79. There seems no valid distinction between compelling the prisoner to uncover his face and to uncover his tattooed arm for identification, nor, aside from the requirements of decency, between inspection in and inspection out of the court room. It is true that one who is accused of crime has not lost his personal rights, and he should be protected against public indignity in the court room and inhuman treatment outside. But not even an examination by physicians is so degrading that protection against it is necessary at the possible cost of justice. Subject to the exception just mentioned, it seems clear that a prisoner should not be allowed to conceal the evidence of his guilt under the plea of privilege. Justice and common sense should control mercy.—*Harvard Law Review.*

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CARRIER'S DUTY TOWARDS PASSENGERS AND LICENSEES.—A recent Texas case, *Houston & Texas Central R. Co.* v. *Phillis* (1902), 69 S. W. 994, raises an interesting question. The plaintiff and his wife were assaulted by a drunken man, who was allowed to come into the defendant's depot. The wife had purchased a ticket and was waiting for a train. The husband was acting as escort and had no intention of becoming a passenger. It was held that the wife was a passenger, and as such, had a cause of action, but that the husband being a mere licensee had no right of action.

It might, with some show of reason, be said that the carrier in the exercise of its public calling, owes a duty to all those who are lawfully in the station, whether passengers or licensees. But the rule which requires a passenger carrier to protect against injuries by third persons has obviously no parallel and no origin in the law of tort. It is a comparatively recent application of the ancient duty to safeguard the passenger. *R. Co.* v. *Burke* (1876), 53 Miss. 200; *Britton* v. *Ry* (1883), 88 N. C. 536. It is paralleled only by the duty imposed upon the carrier of protecting its passengers from wanton assaults by its servants, whether the acts are within the apparent scope of authority or not. See 2 Col. Law Rev. 488. It is no light responsibility, and should not be lightly imposed. The mere fact that the railroad is a carrier of passengers has not been considered a ground for extending its liability to the general public, beyond that

of the innkeeper or the man who keeps a shop. The extraordinary duties of the carrier are those owed to passengers, and, unless the dual relation of passenger and carrier exists, one must agree with the result reached in the principal case as far as the rights of the husband are concerned.

The adoption of this test as a working rule, however, is not without its difficulties. It raises the perplexing question of defining the term passenger. Nor have judicial *dicta* thrown much light on the subject. In the majority of cases, it would make not the slightest difference in the result reached, whether the person seeking redress were a passenger or a licensee. The carrier, like the innkeeper or shopkeeper, is under a duty to keep its premises in safe condition. Where the cause of action arises from a failure to perform this duty, it matters not that the plaintiff is a passenger, and to call him such is entirely *obiter*. The analogy between freight and passengers, which is sometimes attempted, *Webster* v. *Fitchburg R. Co.* (1894), 161 Mass. 298, is in some degree helpful. In the case cited it is said: "One becomes a passenger on a railroad when he puts himself into the care of the railroad company to be transported, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, and so the existence of the relation of passenger and carrier, is commonly to be implied from circumstances." Mr. Hutchinson in his work on Carriers (2d ed. sec. 562), after adverting to the fact that mere intention to become a passenger does not suffice, states the rule thus, "But if the intention and the act of the party combined are such as to give rise to an implied contract to carry, the duty and obligation of the carrier as such at once begin." This is merely a different way of stating the rule as laid down in the *Webster* case (*supra*), for to imply a contract in fact is to assume from the facts that the carrier had accepted the passenger.

In Kentucky a statute provides that all railroad companies shall open their ticket offices and waiting-rooms for the passengers at least thirty minutes before the schedule time for the departure of trains. A recent case in that jurisdiction decides that an acceptance will not be presumed before that time, and that where a person is injured by third parties in the depot three hours before train time the carrier is not liable, *Ill. Cent. R. Co.* v. *Laloge* (Ky., 1902), 69 S. W. 795. The same result was reached in *Phillips* v. *Southern R. Co.* (1899), 124 N. C. 123, where a rule of the company required its waiting-rooms at a station to be closed until thirty minutes before the departure of the next train.

In the principal case the facts justify the conclusion reached by the court that the wife was a passenger. Her right to recover was therefore well recognized. And since this extraordinary duty of protection against third persons has been imposed only in favor of passengers, or at least those who have lawful business with the carrier as such—see *Daniel* v. *R. Co.* (1895), 117 N. C. 502—the further conclusion that the husband could not recover, must also be considered warranted. —*Columbia Law Review.*

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THE FIFTY PER CENT. CONTINGENT FEE HELD UNCONSCIONABLE. —The opinion of Judge Lacombe, printed on the first page to-day [*Herman* v. *Metropolitan St. Railway Co.* (U. S. C. C. 2d Circ., Jan. 1903.)] recalls the old story

that when a lawyer was asked by his client to define a contingent fee, the lawyer replied: "If you lose, I get nothing; if you win, you get nothing."

This decision, which pronounces an agreement for a fifty per cent. contingent fee unconscionable in an accident case follows closely upon the decision of the Appellate Division of the Supreme Court in this Department in *Matter of Fitzsimmons* (N. Y. Law Journal, January 2, 1903), in which a similar proportionate compensation was declared unconscionable in a Surrogate's proceeding. The two decisions ought to discourage the policy of "striking" for very large percentages of recoveries. The position taken by Judge Lacombe is quite radical, because the amount of the verdict was small, and we are not prepared to say that in some cases one-half of the recovery would be an unjust or an unfair compensation. Nevertheless, the general disposition to extortion is deserving of all the condemnation it has received, and if it be necessary in order to curb it to make an inflexible rule as to what rate of contingent compensation shall not be exceeded, we are prepared to subscribe to it. It seems proper to repeat in the present connection some remarks made in this place on a former occasion:

"We believe that the regular business of prosecuting negligence actions for a proportionate share of the recovery tends to deaden a lawyer's responsibility as an officer of the court and undermine his moral scruples. Conceding that cases occasionally may be accepted upon such retainers, without material demoralization, the constant temptation of a contingent personal gain can hardly fail to exert an evil influence upon professional character. But, however subversive of professional ideals the contingent fee system may be, we have to deal with a condition, not a theory. The modern business tendency towards organization and concentration has led to the establishment of elaborate systems for the defense of negligence actions, in the form of guaranty companies and the legal and private detective service of common carriers. In the face of such organization for defense there is bound to be ever increasing organization for prosecution. Nor, under the circumstances, is it entirely to be deprecated. A legal establishment, constantly having many cases of the same class and with systematic facilities for conducting them, can be relied on more vigorously and effectively to champion the right of an indigent litigant to adequate indemnity than the ordinary practitioner.

"Nevertheless the present system tends to breed abuses on both sides—tampering with witneesses, subornation of purjury, &c., &c. It would seem that the time has passed for regarding the 'accident business' as something exceptional and to be tolerated only through ignoring its existence. Where professional abuses or improprieties occur, either on the side of the prosecution or the defense, they should be energetically exploited by the practitioner aggrieved. If this result in counter charges against the complainant, so much the better. The 'negligence business' is beset with so many temptations that it cannot be kept fairly clean save through vivid fear of exposure and punishment.

"Also, it would seem that some arbitrary limit should be placed by law upon the proportion of a verdict that a lawyer may take. It amounts to a *reductio ad absurdum* for him to be permitted to pocket one-half of the generous sum which his eloquence has drawn from the jury, in consideration of his client's serious and permanent injuries. Of course, no mathematically just apportionment between attorney and client is possible. There must always be a more or less

rough approximation. In cases where the injury is slight and the verdict low, the fifty per cent. contingent fee may not be inequitable. Any law to be framed might provide a sliding scale for small verdicts. But, in our judgment, the fifty per cent. fee as a general feature should be frowned upon by professional sentiment and not tolerated by law. The right to contract for proportionate fees without limitation tends to aggravate all the inevitable evils of the system. Business conditions have so thoroughly established the contingent fee custom in negligence cases that its existence should be formally recognized, and in the respect indicated, and perhaps in other respects to be suggested by our readers, it should be regulated."—*New York Law Journal.*

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CONSTITUTIONAL LAW — LIBERTY OF CONTRACT — DUE PROCESS OF LAW — EQUALITY OF RIGHTS.—The legislature of Indiana, at its session of 1899, enacted a statute for the protection of all employees except those employed by common carriers engaged in interstate commerce. In one section it provided for the payment of wages in money, and required their payment within a limited time after being earned. In another section it was provided that "The assignment of future wages to become due to employees from persons, companies, corporations or associations affected by this act is hereby prohibited, nor shall any agreement be valid that relieves said persons, companies, corporations or associations from the obligation to pay weekly the full amount due or to become due to any employee, in accordance with the provisions of this act," with a proviso permitting advancements by employers to employees.

This statute was passed upon in a case where a carpenter who was an employee made an assignment of two dollars a month of his wages, as they might in future become due, until the total sum so assigned should amount to $61.25, in payment for a course in architecture to be furnished by the assignee. This assignment was in the form of an order made by the employee upon the employer, and accepted by him. Action was brought by the assignee against both employee and employer. Defendants demurred to the complaint, the demurrer was sustained, error was assigned on the ruling sustaining the demurrer, and the court of review affirmed the lower court. *International Text-Book Co.* v. *Weissinger* (1902), — Ind. —, 65 N. E. Rep. 521.

The contention of the plaintiff against the statute was that it violated the bill of rights of the constitution of Indiana, and the fourteenth amendment to the constitution of the United States, by prohibiting and limiting the right to make contracts. There was no contention against the validity of the order, except such as was founded in the alleged invalidity of the statute. This case calls attention again to a class of legislation which is becoming common, and the validity of which is attacked, sometimes as being a violation of the guarantee of equal protection, as in cases where the statutes are not of general application, but usually as in unreasonable restraint of the liberty of the citizen, and in violation of the rule of "due process." Without attempting a reference to the great variety of cases in which the "liberty" of the citizen, or even the wide range of those where the liberty to make contracts is involved, such legislation is illustrated by the statutes fixing hours of labor, providing for the payment of wages in money only, and statutes controlling in some measure the method of

fixing wages, as by requiring that where coal is mined by weight, it must be weighed before screening. These are all statutes abridging the right of the citizen to make contracts, a right which is within the protection of the fourteenth amendment. "The 'liberty' contemplated in this provision means not only the right of freedom from servitude, imprisonment or physical restraint, but also the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, vocation, trade or profession, to make all proper contracts in relation thereto, and to enjoy the legitimate fruits thereof." Caldwell, J., in *Harbison* v. *Knoxville Iron Co.*, 103 Tenn. 421, 429, 53 S. W. 955, 76 Am. St. 682, 687. Neither the courts generally, nor the individual members of the same court in many cases, are able to agree as to the validity of this class of legislation, but where such legislation is upheld, it is usually supported upon that somewhat elastic doctrine we know as the police power. As illustrative cases, we refer to *People* v. *Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. 605, attempting to fix wages of employees on city contracts at the rate generally paid to employees in like occupations, held invalid; *Holden* v. *Hardy*, 169 U. S. 366, limiting employment of miners to eight hours a day, upheld; *contra*, in a strong opinion, citing authorities, *In re Morgan*, 26 Colo. 415, 58 Pac. 1071, 77 Am. St. 269; *Fishe* v. *People*, 188 Ill. 366, 58 N. E. 985, 52 L. R. A. 291, limiting hours of labor on all city contracts to eight hours, declared invalid; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, declaring valid a statute requiring payment of wages in money at option of employee; *In re House Bill No 1230*, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344, requiring weekly payment of wages; *State* v. *Wilson*, 61 Kan. 32, 58 Pac. 981, 47 L. R. A. 71, sustaining a statute requiring weighing of coal, for the purpose of fixing wages before it is screened, *contra In re Preston*, 63 Ohio, 428, 59 N. E. 101, 52 L. R. A. 523. It is worthy of note that the supreme court of Tennessee did not deem it necessary in *Harbison* v. *Knoxville Iron Co.*, 103 Tenn. 421, 76 Am. St. 682, to rely upon the police power to sustain the legislation involved in that case, and the supreme court of the United States is usually quoted as indorsing this view of the state court, but an examination of the opinion of the federal court will indicate that that court reached its conclusion through the application of the doctrine of the police power.

The Indiana statute involved in the case being now considered, seems to go a step further in the line of this paternal legislation, and the court in sustaining it, seems to see a serious public evil in permitting the wage earner to anticipate the payment of his wages. Says the court: "A large proportion of the persons affected by these statutes of labor are dependent upon their daily or weekly wages for maintenance of themselves and families. The situation of these persons renders them peculiarly liable to imposition and injustice at the hands of employers, unscrupulous tradesmen and others who are willing to take advantage of their condition. Where future wages may be assigned, the temptation to anticipate their payment and to sacrifice them for inadequate consideration is very great. Such assignments would in many cases leave the laborer or wage earner without present or future means of support. By removing the strongest incentive to faithful service—the expectation of pecuniary reward in the near future—their effect would be alike injurious to the laborer and the employer." Much of the reasoning of the court in the opinion would seem to apply to the

provision of the statute permitting the advancement of wages by the employer, and argue against its incorporation.

But are we not losing sight of what Judge Cooley called one of the maxims of constitutional law, that "those who make the laws are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court, and the countryman at plough?" Const. Lim. (6th ed.) 483. Where are the boundary lines limiting the power of legislatures, if statutes like the one in question are upheld? Will not the reasoning which supports this statute, support a statute requiring the employee who does not own a home to put into some approved depository a certain proportion of his wages until such time as such deposit shall enable him to purchase a home of a specified value, and authorizing it to be expended in such purchase only; or a statute requiring the wage earner to make no contracts involving the expenditure of his wages without advising with an approved adviser, one of those persons belonging to some other than the wage earning class, all of whom are assumed to be capable of making contracts generally, with prudence and profit to themselves? In the language of Judge Cooley, the regulations made for any one class of citizens "restricting their rights, privileges, or legal capacities in a manner before unknown to the law, must rest upon some reason upon which they can be defended—like the want of capacity in infants and insane persons. If the legislature should undertake to provide that persons following some specified lawful trade, or employment, should not have the capacity to make contracts, . . . or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power."—*Michigan Law Review.*

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CODE OF ETHICS OF THE LOUISVILLE BAR ASSOCIATION.—The Louisville (Ky.) Bar Association has recently adopted a Code of Ethics, a copy of which is printed below. It is brief, and therefore more apt to be read and remembered. We commend these excellent precepts to our readers. The Virginia State Bar Association has promulgated an elaborate Code of Ethics, of marked excellence, but we fear few members of the Association, and still fewer non-members, who presumptively need it most, have taken the time to read it. It is published in each number of the Bar Association Reports. We should be glad to see it reproduced also in each volume of the Virginia reports. The cost would be insignificant, and the wider circulation and increased publicity thus secured would work for good, particularly in the case of those who transgress the ethics of the profession rather through ignorance or thoughtlessness than deliberate intention.

The subjoined code was prepared by a committee of the Louisville Bar, consisting of Messrs. James S. Pirtle, John B. Baskin, O. A. Wehle, and Bernard Flexner.

1. It shall be deemed unprofessional conduct for an attorney at law, by personal solicitation or by agents or runners sent by him, or circulars sent by him or with his previous consent, to seek out any person supposed to have any business usually performed by a lawyer; or by an unsolicited offer of professional assistance endeavor to procure employment with reference to such business; or for an attorney at law to solicit business by means of anonymous announcements

or announcements signed with the name of an actual or fictitious person or corporation, or by inviting correspondence with the prospective litigants; provided, however, that it shall not be considered a breach of professional ethics for an attorney at law to give notice of changes in the personnel of his office or firm, or removals, etc., by announcement of the fact through the mails or public press, for not exceeding thirty days after such change or removal; and provided further, that it shall not be deemed unprofessional conduct for an attorney at law to put his professional card in a newspaper or any other publication.

2. It shall be deemed unprofessional conduct for an attorney at law to publish or cause to be published, or to aid and abet in publishing or causing to be published in a newspaper, comments or criticisms upon the court or the decisions of the court in any action in which he may be counsel.

3. It shall be deemed unprofessional conduct for an attorney at law to be in any way connected with, or to act for, any individual or for any organization or corporation engaged in fostering litigation and stirring up claims against individuals or corporations.

4. It shall be deemed unprofessional conduct for an attorney at law to compromise a suit or attempt to do so with the opposite party to a controversy, or to take any steps with reference to such compromise or settlement, without notice in writing to the attorney of record of such opposite party, sufficiently long to enable such attorney to consult with his client about such proposed compromise.

5. It shall be deemed unprofessional conduct for an attorney at law to suggest to any official of any court, or any other person, the name of any person for jury service with the expectation or intention that such person shall be used as a juror.

6. It shall be deemed unprofessional conduct for an attorney at law to wilfully fail within reasonable time to notify his client of the receipt of any money, document, or property received by him for such client; or without good cause to refuse to pay any money or deliver any property in his hands belonging to a client; or by evasion to postpone the just claims of a client against him or to force his client to expense or litigation in the collection of any just claim against him.

7. It shall be deemed unprofessional conduct for an attorney at law to deceive or attempt to deceive the court or jury, or to instigate his client or any one on behalf of his client to do so, by false statements or by testimony known by such attorney to be false.

8. It shall be deemed unprofessional conduct for an attorney at law to garble, distort, or knowingly misquote the language of a statute, decision, or text-book, or document, by omitting any part of such quotation, or adding thereto and thereby making it appear that such quotation is an authority for his side.

9. It shall be deemed unprofessional conduct for an attorney at law of his own motion to talk or to attempt to talk or communicate privately and in the absence of the attorney for the other side with the judge of the court concerning the merits of any case in which he is interested as counsel, or to instigate his client or any one on behalf of his client to do so.

10. It shall be deemed unprofessional conduct for an attorney at law to do or counsel the doing of any act that is actually fraudulent or that is denounced by law.

11. It shall be deemed unprofessional conduct for an attorney at law to offer or promise protection or immunity from prosecution, or exposure, to any one as an inducement to settle a claim.

12. It shall be deemed unprofessional conduct for an attorney at law to refuse to testify before, or give information to, the committee of investigation or to the trial committee of the Louisville Bar Association concerning any matter that may be pending before such committees or either of them; provided, that this shall not apply in cases where it would be a violation of law, or unprofessional duty on the part of the attorney at law.